2520

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HILL COUNTY,
Plaintiff in Error,
v.
SHAW & BORDEN COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

JOHN B. CLAYBERG,
GUNN, RASCH & HALL,
Attorneys for Defendant in Error.

SHAW & BORDEN CO. 151361

UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

HILL COUNTY,)
Plaintiff in Error.)
vs.)
SHAW & BORDEN COMPANY,)
Defendant in Error.)

In behalf of defendant in error, we desire to have the following cases inserted in our brief.

No title passed by the void contract, even though the property was delivered to plaintiff in error thereunder.

DUNLOP vs. MERCER, 156 Fed., 545
TATE vs. GAINES, 105 Pac., 193

The doctrine of the Supreme Court of the United States, as announced in brief for defendant in error, is confirmed in the following cases.

LOGAN COUNTY BANK vs. TOWNSEND, 139 U.S.,67
CENTRAL BANK vs. APPLETON, 216 U.S.,196
RANKIN vs. MIGH, 218 U.S., 27

JOHN E. CLAIBORNE,
GUNN, RASCH & HALL,

Attorneys for Defendant in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HILL COUNTY,
Plaintiff in Error,
v.
SHAW & BORDEN COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

In this case it appears from the agreed statement of facts that Hill County entered into a contract with one B. B. Weldy by which Weldy agreed to sell and deliver certain personal property to said county and to do certain printing. It further appears that Weldy sublet a portion of this contract to the defendant in error, and that thereupon the defendant in error furnished and delivered to the plaintiff in

error the items of property described in exhibit "A" to the complaint. A taxpayer obtained an injunction, enjoining the county from paying any claim of the said Weldy for the said property. The injunction was granted for the reason that the subletting of said contract by said Weldy to defendant in error was in violation of section 2897 of the Revised Codes of Montana. Defendant in error demanded a return of the property or payment of the value thereof. The demand was refused and thereupon this action to recover for the conversion of said property was instituted.

The demand for the return of the property and the action for the conversion thereof are in disaffirmance of the contract. Furthermore as the contract was illegal, the title to the property did not pass from defendant in error. In view of these considerations the plaintiff in error is liable for a conversion of the property. The right of recovery under the circumstances is sustained by decisions of the Supreme Court of the United States and decisions of the Supreme Court of Montana as well, to which reference will be made.

In the case of *Morse v. Granite County,* 19 Mont. 450, it appeared that one Cain, a county commissioner of Granite County, sold certain property to the county. He presented a claim to the county for the value of the property, which was allowed. A taxpayer appealed to the District Court from the allowance of the claim and the court disallowed the claim for

the reason that the contract of sale was illegal by virtue of section 1110 of the Fifth Division of the Compiled Statutes of Montana of 1887, which prohibited a county commissioner from selling property to the county of which he was a commissioner. Cain then sold the property to the plaintiff Morse and Morse sold the property to the county. The action was for the recovery of the value of the property. The court in the opinion said:

> "Now, without commenting on this statute, let us inquire what was the effect of the judgment of the district court in holding and adjudicating Cain's claims against the county for this property 'illegal and void.' Counsel for respondent say that, by such adjudication, the property became the property of the county, and that thereafter Cain had no authority to sell it to Morse or any one else. *The district court held the contract of sale of the property between Cain and the county to be void, because prohibited by statute. This left the title to the property still in Cain. The court did not and could not, by such adjudication, confiscate Cain's property.* If, after such adjudication by the district court, the county kept possession of the property, and appropriated it to its use, it could not avoid paying the reasonable value thereof, because the contract by which it obtained it was *ultra vires,* illegal, and void. This question is fully discussed by this court in *State ex rel., etc., v. Dickerman,* 16 Mont. 278, 40 Pac. 698." (Italics ours.)

In the brief for plaintiff in error an attempt is made to distinguish this case from the case before the court. It is said:

> "No question of the right of Cain to recover the value of this property from Granite County arose, or could arise, in an action by Morse to recover the value thereof; nor was it necessary, nor could it by any possibility be necessary, for the court to determine in an action brought by Morse what the rights of Cain might be in a direct action by him to recover the value of his property from Granite County."

As shown by that part of the opinion quoted, the contention was made in behalf of the county that the property at the time of the sale to Morse was not the property of Cain but belonged to the county. This was the sole defense in the action. The court, however, decided against this contention. It follows, as a matter of course, that Cain could have maintained an action against the county for the recovery of the property, or its value, or otherwise he could not have made the sale to Morse. In other words, unless Cain had title and a right of action against the county for the recovery of the property, or its value, the sale to Morse could not have placed Morse in a position where he could sell to the county. We submit that there is no distinction in principle between the case of *Morse v. Granite County* and the case before the court.

In the case of *Missoula Street Railway Company v. City of Missoula,* 47 Mont. 85, which involved a contract with a municipality, made in violation of a statute, requiring advertisement and the letting of the contract to the lowest responsible bidder, the court said:

> "It may well be said that, in cases in which the municipality has acquired property which is still in specie, it may not be allowed to retain it and at the same time refuse to pay its reasonable value. In such a case, however, its liability would rest upon different principles. The contract being void, the title to the property would not vest under it, and the seller would be in a position to reclaim it, or, if restoration of it should be refused, to recover reasonable value of it. But even in such a case the liability would not arise out of the contract."

In the case of *Chapman v. Board of County Commissioners of Douglas County,* 107 U. S. 348, land had been conveyed to a county for a poor house pursuant to an agreement which, in its provisions relating to the time and mode of payment, was in excess of the authority of the county. The suit was for the purpose of recovering possession of the land and obtaining a reconveyance of the title. The court in the opinion said:

> "As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *Marsh v. Fulton Co.,* 10 Wall. 676-684, and repeated in *La. v. Wood,* 102 U. S. 294-299, 'The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or com-

pensation.' And see, also, *Miltenberger v. Cooke,* 18 Wall. 421. The illegality in the contract related, not to its substance, but only to a specific mode of performance, and does not bring it within that class mentioned by Mr. Justice Bradley in *Thomas v. Richmond,* 12 Wall. 349-356. The purchase itself, as we have seen, was expressly authorized. The agreement for definite times of payment and for security alone was not authorized. It was not illegal in the sense of being prohibited as an offense; the power in that form was simply withheld. The policy of the law extends no further than merely to defeat what it does not permit, and imposes upon the parties no penalty. It thus falls within the rule, as stated by Mr. Pollock, in his *Principles of Contract,* 264: 'When no penalty is imposed, and the intention of the Legislature appears to be, simply, that the agreement is not to be enforced, then neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose.' "

In the case of *Parkersburg v. Brown,* 106 U. S. 487, which involved the right to recover property or its value from a city which had received same pursuant to an illegal contract, the court in the opinion said:

"The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the City from retaining the benefit which it has derived from the unlawful act. 2 *Com. Cont.* 109. There was no illegality in the mere putting of the property by the O'Briens in the hands of the City. To deny a remedy to reclaim it, is to give effect to the illegal contract. The illegality of that contract does not arise from any moral

turpitude. The property was transferred under a contract which was merely *malum prohibitum,* and where the City was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received."

In the case of *Pullman's Palace Car Co. vs. Central Transportation Co.,* 171 U. S. 138, the court said:

"But in the case of this lease, now before the court, a recovery of the rent due thereunder was denied the lessor, although the lessee had enjoyed the possession of the property in accordance with the terms of the lease. It was said (page 60 of the report in 139 U. S., 35-69): 'The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action was not to affirm, but disaffirm, the unlawful contract.' And the opinion of the court ended with the statement that 'Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit,* or otherwise, independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, according to the declaration and evidence,

was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant was not liable for.'

"The principle is not new; but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord Mansfield in *Holman v. Johnson,* 1 Cowp. 341, decided in 1775, that 'the objection that a contract is immoral or illegal as between the plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.'

"The cases upholding this doctrine are numerous and emphatic. Indeed, there is really no dispute concerning it, but the matter of controversy in this case is as to the extent to which the doctrine should be applied to the facts herein. Many of these cases are referred to and commented upon in the opinion delivered in the case in 139 U. S. 24, already cited. The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it. For illustrations of the general doctrine as applied to particular facts we refer in the margin to a few of the multitude of cases upon the subject.

"They are substantially unanimous in expressing the view that in no way and in no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of prop-

erty delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not in such endeavor permit any recovery which will weaken the rule founded upon the principles of public policy already noticed."

In the case of *Pelosi v. Bugbee,* 105 N. E. (Mass.) 222, the court in the opinion said:

"The plaintiff in the case at bar, however, is not seeking to enforce any rights under the illegal contract made with Tedesco, but seeks to recover the value of the ring, to which he claims title and which has been converted by the defendant. The agreement between the plaintiff and Tedesco provided that the title to the ring should remain in the plaintiff until paid for, and while this agreement was void and would not be enforced by either party to it because of its illegality, yet the title to the ring was not changed thereby. It still remained in the plaintiff, whose title was not affected by the delivery of possession thereof to Tedesco. The plaintiff's general property in the ring did not arise from the illegal contract, nor was it determined by it. This action is based upon the conversion by the defendant of the plaintiff's property and is wholly independent of the contract between the plaintiff and Tedesco. It is true that the delivery of possession of the ring to Tedesco was under an unlawful agreement which could not be enforced, yet that fact does not affect the liability of the defendant for his wrongful act in converting to his use the

plaintiff's property. This distinction is recognized in *Hall v. Corcoran,* 107 Mass. 251, 9 Am. Rep. 30. It is clear upon principle and authority that while the plaintiff cannot enforce the illegal contract, he may maintain an action for conversion."

See also:

Butts County v. Jackson Banking Co., 15 L. R. A. (N. S.) 567 and note.
State v. Dickerman, 16 Mont. 278.
Brown v. City of Atchison (Kans.), 17 Pac. 465.
White v. Bank, 39 Mass. 181.
Urwan v. Insurance Co., 103 N. W. 1102.

In the opinion in the case of *National Bank & Loan Co. v. Petrie,* 189 U. S. 423, the court said:

"Cases where the action is on the illegal contract do not apply. Such was *First Nat. Bank v. Hoch,* 89 Pa. 324, 33 Am. Rep. 769. Here the attempt is to recover outside of it, treating it as set aside. * * *

"But when a right is claimed to repudiate it, the party who denies the right is the one who relies upon the contract, and that party must take it as it was made."

In the case before the court the defendant in error repudiates the contract. The action is in disaffirmance of the contract. As title to the property did not pass to the county by virtue of the contract, the title is, and always has been, in the defendant in error. It is not necessary for the defendant in error to rely upon the contract. On the other hand, the plaintiff in error bases its claim to retain the property

on the contract. It is attempting to take advantage of the illegal contract, while the defendant in error has disaffirmed the contract and asserts a right of recovery independent of the contract. The contract is not *malum in se,* but is merely *malum prohibitum.* The statute—section 2897 of the Revised Codes—makes it the duty of the county commissioners to contract with a newspaper of general circulation, published within the county for a period of six months prior to the making of the contract. The statute further provides:

> "All newspapers which may receive any contract for printing under this act which may not be able to execute any part of such contract shall be required to sub-let such contract or portion of contract to some newspaper or printing establishment within the state, which may be competent to execute such work, at not to exceed the rates herein mentioned."

No penalty for a violation of the statute is provided.

As the principles announced in the cases decided by the Supreme Court of Montana, and by the Supreme Court of the United States, to which reference has been made, are controlling, it is unnecessary to review or distinguish the many cases cited in the brief for plaintiff in error.

In conclusion, we respectfully submit that the judgment of the lower court should be affirmed.

JOHN B. CLAYBERG,
GUNN, RASCH & HALL,
Attorneys for Defendant in Error.